FILE COPY

IN THE

Supreme Court of the United States

October Term, 1961

No. 244

DAIRY QUEEN, INC.,
Petitioner

vs.

THE HON. HAROLD K. WOOD, *Judge*, ET AL.
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The Order of the Court of Appeals is not yet officially reported. There was no opinion. The Opinion of the District Court of the Eastern District of Pennsylvania is reported in 194 F. Supp. 686 (1961 D.C., E.D. Pa.). The Orders and the District Court Opinion are printed in the Transcript of Record (R. 34-37; R. 53-54).

Jurisdiction

The Order of the Court of Appeals denying the Petition for Writ of Mandamus was entered on June 22, 1961. The Petition for Writ of Certiorari was filed on July 21, 1961, and was allowed on October 16, 1961. The jurisdiction

of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

Statutes Involved

Statutes involved are 28 U.S.C. 1254 (1); the Seventh Amendment to the Constitution of the United States; Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. 723C; Act of June 25, 1948, as amended, 62 Stat. 961, 28 U.S.C. 2072; Federal Rule of Civil Procedure 38(a). Pertinent provisions of the above appear at pages 14, 15 infra.

The Question Presented

Where a complaint asserts a legal cause of action and an equitable cause of action, may a Court deny a timely demand for jury trial where plaintiff has alleged, as the basis of both causes of action, the omission of defendant to pay a sum due under a written contract and this is a common substantial question of fact which will determine both the legal and equitable causes of action?

Statement

This action was commenced in the United States District Court for the Eastern District of Pennsylvania on November 21, 1960, by McCullough and others.[1]

A. Jurisdiction

The jurisdiction of the District Court was founded on diversity of citizenship of the parties and on an allegation of an amount in controversy exceeding the sum of $10,000. (Par. 3 of the Complaint, R. 10).

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[1] The plaintiffs in this case are H. A. McCullough and H. F. McCullough, a partnership doing business as "McCullough's Dairy Queen". They are the real parties in interest and are herein called "McCullough". The second-named plaintiffs are recited as Burton F. Myers, Robert J. Rydeen, M. E. Montgomery and Lorraine Dale, Executrix of the Estate of Howard S. Dale, Deceased.

B. THE COMPLAINT

The Complaint of McCullough made, inter alia, the following allegations (R. 9-17):

1. McCullough and others originated the name "Dairy Queen". On January 2, 1947 McCullough registered the Trademark "DAIRY QUEEN" in Pennsylvania for a frozen dairy product, which registration is current (R. 10).

2. By written agreement dated October 18, 1949, herein called Territory Agreement, McCullough granted to the other plaintiffs a franchise for the exclusive right to use the trademark in certain portions of Pennsylvania, and as a result of intervening documents Petitioner, on December 23, 1949, obtained the rights and obligations of the said Territory Agreement. (A copy of said Territory Agreement is attached to the Complaint.) (R. 20-28)

3. In the Territory Agreement Petitioner agreed to pay the sum of $150,000 with a small initial payment, the remaining payments to be made at fifty percent of all amounts on sales or use of franchises, the $150,000 payment to be completed within a certain period of time by annual minimum payments. The contract provided, inter alia:

> "2—The aggregate total amount paid to First Party by Second Party under Subsection 1 above, and this Subsection 2 shall be not less than the amount of $18,625.00 in the year ending October 15, 1950, and in each year ending on October 15th thereafter, until the said total amount of $149,000.00 has been fully paid to First Party as provided under this section (b) of paragraph 4." (R. 22)

4. Petitioner "for a number of years" has ceased paying the aforesaid 50% of the value of all franchises sold or used as required in the contract, as well as the annual minimum payments specified in the contract (R. 13).

5. Defendant (Petitioner) is in *default* to McCullough under the said contract in excess of $60,000 (R. 13). (Emphasis supplied throughout.)

6. On August 26, 1960, McCullough notified Petitioner by letter (copy of which is attached to the Complaint as Exhibit C) that its failure to pay the amounts required in its contract with McCullough constituted a "material breach" of that contract and "that unless this material breach is completely satisfied for *the amount due and owing*, your franchise for 'Dairy Queen' in Pennsylvania is hereby cancelled." (R. 27, 28)

7. There were three separate prayers for relief (R. 15-16):

(a) An injunction to restrain Petitioner from using or licensing others to use in any wise or manner the name, "Dairy Queen".

(b) "Ordering an accounting to determine the exact amount of money owing by defendant to McCullough's Dairy Queen, and *thereafter entering judgment in favor of McCullough's Dairy Queen and against defendant in such amount.*"[2]

(c) An injunction to restrain Petitioner from collecting sums payable to it in the conduct of its Dairy Queen franchise and requiring the said sums to be paid into the registry of the Court.

C. PETITIONER'S ANSWER WITH DEMAND FOR JURY TRIAL

1. On March 1, 1961, Petitioner filed its Answer.

2. Petitioner demanded, by inclusion in its Answer and endorsement thereon, a jury trial (R. 32).

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[2] Plaintiffs, Myers, Rydeen, Montgomery & Dale, in their prayer seek an accounting for "monies due and owing" McCullough (R. 16-17).

3. Petitioner's Answer alleged the following defenses:

(a) On or about January of 1955, the parties had entered into an oral agreement modifying the manner in which the balance of the total consideration of $150,000 was to be paid, in that, effective October 15, 1954, the obligation of Petitioner to make the aggregate annual payment of $18,625. was no longer required but thereafter Petitioner would pay McCullough fifty percent of the proceeds received from the sale of sublicenses made under the said agreement. It was further alleged that thereafter over a period of five years Petitioner made and McCullough received the payments required under the said oral arrangement and modification agreement (R. 31-32).

(b) McCullough was barred from the relief prayed for by virtue of misuse of the "Dairy Queen" trademark in which was included McCullough's conspiracy with others throughout the United States to extend the payment of royalties for the use of a patented freezer which had been licensed under the said Territory Agreement of October 18, 1949, beyond the expiration date of the said patent; and by compelling Petitioner to use no other freezer but the patented freezer and to purchase it solely through McCullough; and by conspiring with the designated manufacturers of the freezer so that sales would be made only to those who acquired a franchise from McCullough for use of the "Dairy Queen" trade name licensed by McCullough. (R. 30-31).

(c) McCullough was barred from the relief prayed for by virtue of violations of the antitrust laws of the United States. (R. 31)

(d) McCullough was barred by laches from asserting the alleged default (R. 31).

(e) McCullough was estopped from any equitable relief because it had knowledge of the alleged breach on October 10, 1954, and permitted Petitioner to spend upward

of $300,000 in further development of the franchise territory thereafter (R. 31).

D. McCULLOUGH'S MOTION TO STRIKE PETITIONER'S JURY DEMAND

1. On March 9, 1961, McCullough caused to be filed in the District Court a Motion to Strike the Petitioner's Demand for a Trial by Jury and relied, *inter alia*, upon the following reason sustained by the Court below:

> "In any event, the issues herein are not triable of right by a jury. Hence, under Rule 38, defendant is not entitled to a jury trial with respect thereto." (R. 33)

E. THE HONORABLE HAROLD K. WOOD'S OPINION AND ORDER

1. On June 1, 1961, Judge Wood filed an Opinion and Order granting McCullough's Motion to Strike the demand for trial by jury and ordering the action to be heard on the merits by the Court sitting without a jury. The grounds stated were, in essence, that: (R. 36-37)

> "As we analyze the issues raised by the complaint and the answer, the nature of plaintiffs' case is purely equitable" either as:
>
> (a) ". . . a claim for relief for infringement of a trademark" . . .
>
> (b) ". . . a prayer to set aside the licensing agreement and restore to the plaintiffs their exclusive right to the use of the trademark 'Dairy Queen' in Pennsylvania . . ."
>
> (c) ". . . a claim to injunctive relief coupled with an incidental claim for damages . . ."

Judge Wood also stated in his Opinion:

"Incidental to this relief, the complaint also demands the $60,000 now allegedly due and owing plaintiffs under the aforesaid contract." (R. 36)

"... if a complaint sought damages for breach of contract, the issues in the case would clearly be legal and the plaintiff or defendant would be entitled to a jury trial of those issues." (R. 35).

F. PETITION FOR WRIT OF MANDAMUS

1. On the 12th day of June, 1961, Petitioner filed a Petition for Writ of Mandamus directed against the Honorable Harold K. Wood, Judge of the United States District Court for the Eastern District of Pennsylvania. In this Petition, Petitioner set forth the above-mentioned facts and contended, inter alia, that the Respondent's Order Striking Petitioner's Demand for a Jury Trial and his Order designating a trial of the cause without jury unlawfully deprived Petitioner of its right to jury trial under the 7th Amendment to the Constitution of the United States (R. 1-9).

2. On June 22, 1961, the Circuit Court of Appeals for the Third Circuit (Goodrich, *J.*), without opinion, denied the Petition for a Writ of Mandamus (R. 53-54).

G. ORDER FOR TRIAL WITHOUT JURY

On June 28, 1961, Judge Wood ordered that the instant action be tried on August 1, 1961, without a jury, which order was stayed by Mr. Justice Brennan on July 31, 1961.

Argument

1. McCullough, in a single action, asserts a claim for $60,000. allegedly due under a written contract [3] and, at

[3] "... the complaint also demands the $60,000 now allegedly due and owing plaintiffs under the aforesaid contract." (R. 36, District Court Opinion)

the same time, seeks equitable relief because of the non-payment thereof. He also seeks to deny defendant a trial by jury.

The Honorable Judge Wood, while conceding that a complaint seeking damages for breach of a contract would present a legal issue and entitle either plaintiff or defendant to a jury trial,[4] and while specifically acknowledging the existence of plaintiff's claim for money alleged to be due under the contract,[5] terms it "incidental damages" and considers it subordinate to the equitable relief sought. This action for debt is given no status of its own. The question of the right to jury trial was thus decided by reference to the complaint read as a whole. The Court then determined the legal action was enveloped in the prayer for equitable relief and the nature of the plaintiff's case was purely equitable (R. 36). The ultimate Order of the District Court striking defendant's demand for jury trial was thus based on an evaluation and balancing of the legal and equitable causes of action to arrive at a conclusion as to the basic nature of the case. The Order denying trial by jury was not based on a determination of whether the case presents a legal issue, but rather on a determination that the equity issue was primary and the legal issue was incidental to it.

2. The right to jury trial is a constitutional one. This right is further protected by the Federal Rules of Civil Procedure, Rule 38(a) in the following language:

> "The right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

No similar requirements protect trials by the court and, therefore, the court's "discretion is very narrowly

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[4] "For example, if a complaint sought damages for breach of contract the issues in the case would clearly be legal and the plaintiff or defendant would be entitled to a jury trial of those issues." (R. 35, District Court Opinion)

[5] See footnote 3, *supra*.

limited and must, wherever possible, be exercised to preserve jury trial". *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510; 79 S.Ct. 948; 3 L.Ed. 2d 988 (1959). Your Honorable Court has indicated the right to a trial by jury cannot be impaired by joining a demand for equitable relief with a claim properly cognizable at law.[6] This is particularly true where, as in the case *sub judice*, joinder has been made of coördinate equitable and legal causes of action involving a common, controlling issue of fact as to which there would normally be a right to a trial by jury. Thus, the right to a trial by jury with regard to a claim properly cognizable at law which has been joined with a demand for equitable relief has been sustained when sought by the plaintiff,[7] or the defendant,[8] or on a counterclaim.[9]

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[6] *Beacon Theatres, Inc. v. Westover*, supra; *Ex Parte Simons*, 247 U. S. 231 (1918); *Scott v. Neely*, 140 U. S. 106 (1891).

[7] *Bruckman v. Hollzer*, 9 Cir. 1946, 152 F. 2d 730. Here, the Circuit Court held that, where a complaint in separate paragraphs alleges causes of action for damages for copyright infringement and also for equitable relief by way of an accounting and injunction, each of the latter of which also involve the issue of infringement, the parties are entitled to a trial by jury with regard to the common law issues prior to a decision on the equitable aspects of the case.

In *Ring v. Spina*, 2 Cir. 1948, 166 F. 2d 546, an anti-trust case, the Circuit Court rejected the argument that the joinder of legal and equitable claims in the same action resulted in a waiver of the right to a jury trial.

[8] *Leimer v .Woods*, 8 Cir. 1952, 196 F. 2d 828. In this case the Court held in an action involving joined or consolidated equitable and legal causes, and a common substantial question of fact, a Federal Court could not, under the Rules of Civil Procedure and the Seventh Amendment, deprive defendant of a properly demanded jury trial upon that question.

[9] *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp. et al.*, 5 Cir. 1961, 294 F. 2d 486. Here, the plaintiff sought injunctive relief and a declaratory judgment. Defendant counterclaimed for damages for patent infringement, fraud and anti-trust violations and demanded a jury trial upon the issues of fact raised by the counterclaim. The Circuit Court held that the jury trial should be held before the equitable questions were decided.

The *Beacon Theatres* case, supra, and the *Thermo-Stitch* case, supra, have ended the earlier practice of resting decisions as to the right to a jury trial on the tenuous ground of "the basic nature of the case taken as a whole." [10] Under this earlier test the constitutional right to trial by jury was in danger of being lost forever in cases involving both legal and equitable issues. It now appears either party is entitled to a trial by jury whether the primary aid sought by the complaint is equitable or legal, so long as a claim cognizable at law is presented by the complaint. The relative weight of the two causes is not controlling. The Court of Appeals for the Fifth Circuit in the recent case of *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, supra, (p. 491) held:

> "It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it."

Under the rule established by the *Beacon Theatres* case, McCullough's claim for $60,000. allegedly due him under the contract should entitle either party to a trial by jury. It is an action of debt, either standing alone, or combined with a prayer for equitable relief.[11] This claim for $60,000. is not one for damages incidental to the alleged breach.[12] It is a claim for payment of monies *due under the*

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[10] *Beacon Theatres, Inc. v. Westover*, supra; *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp. et al.*, supra.

[11] An action of debt is a common law action falling within the jury trial guarantee of the Seventh Amendment. *Leimer v. Woods*, supra.

[12] It is submitted that Judge Wood's use of the concept of "incidental damages" is inapplicable to the case *sub judice*. Incidental damages as used in equity imply those damages caused by the activities sought to be enjoined, and not those claims which are, themselves, the very basis for the relief sought. *Leimer v. Woods*, supra.

contract, the alleged failure to pay it being the breach itself.[12]

The right to injunctive relief in the instant case is predicated solely on the alleged breach of the contract through failure to pay the very same amounts which plaintiff seeks to recover in the legal cause of action. If Petitioner is correct in its assertion under the facts, and the jury finds there has been no breach of the contract, plaintiff cannot prevail either in law or in equity. What plaintiff seeks to do is to have the Court determine this vital fact question without benefit of a jury and effectively deny Petitioner its constitutional right to a trial by jury, since the Court's determination would be final in the legal cause of action through res adjudicata, or by collateral estoppel.[14]

3. The Circuit Court of Appeals' Order denying Petitioner a Writ of Mandamus will require Petitioner to defend itself, in an action of debt, without the right to a trial by jury. If Petitioner is denied this right to a jury trial, plaintiffs will have the Court's approval to circumvent the clear meaning of the Seventh Amendment to the United States Constitution, the Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C., 723c, Act of June 25, 1948, as amended, 62 Stat. 961, 28 U.S.C. 2072, and Rule 38(a) of the Federal Rules of Civil Procedure, all of which guarantee the right to a trial by jury in suits at common law.[15]

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[12] The breach ascribed to defendant was the failure to heed the written notice of August 26, 1960, which recited defendant's "failure to pay the amounts required in your contract . . . constitutes . . . a material breach of that contract . . . unless this material breach is completely satisfied for the amount due and owing your franchise . . . is hereby cancelled." (R. 27, para. 16 of the Complaint, R. 14)

[14] *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, supra.

[15] It would appear that this deprivation of a trial by jury is as prejudicial to both parties, as the Seventh Amendment is beneficial to both parties, the community and the Court itself. What was said by the Honorable Arthur Vanderbilt, former Chief Justice of the State of New Jersey, seems applicable:

"The jury is beneficial to the judge for at least two reasons. First of all, the facts of a case, both at the trial and appellate

It is submitted that the constitutional right of trial by jury will cease to exist in many instances if a plaintiff can deprive a defendant of that fundamental and cherished right by the mere expedient of joining an equitable cause of action with a legal cause of action. This is particularly true where the equitable cause of action is founded on the same allegations of fact which will determine the ultimate outcome of the legal cause of action.[16] Under the theory upheld by the Courts below, a plaintiff can deprive a defendant of a jury trial in a debt action if the plaintiff claims for payment of the debt and then asserts a claim for equitable relief which is alleged to arise from the failure to pay the debt.

In the present case the Orders of the Courts below are in conflict with the decision of this Court in the *Beacon Theatres* case, supra, and with the decision of the Fifth Circuit in the *Thermo-Stitch* case, supra. As stated by this Court in the *Beacon Theatres* case: (R. 510, 511)

> ". . . only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

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levels, are often more difficult to decide than the law of the case. Secondly and far more important, it spares him from making the harsh decisions that the sharp application of the law to the actual facts of a hard case would often require."

Arthur T. Vanderbilt, *Judges and Jurors, Their Functions, Qualifications and Selection*, Boston (1956), p. 57.

[16] The jury, of course, does not grant the relief sought; its function is "simply to answer the question so that judgment may be given." Sir Patrick Devlin, *Trial By Jury*, London (1956) p. 13. After the fact question is resolved by the jury, the Court can give such legal or equitable relief as the matter warrants.

CONCLUSION

Wherefore, Petitioner prays that the Order of the Court of Appeals Denying the Petition for Writ of Mandamus be reversed and the case be remanded to the Court of Appeals with directions to issue the Writ of Mandamus as prayed for in the Petition to the Court of Appeals.

Respectfully submitted,

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APPENDIX A

Statutes

28 U. S. C. 1254(1).

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

Constitution of the United States—
Seventh Amendment.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reëxamined in any Court of the United States, than according to the rules of the Common law.

ACT of JUNE 25, 1948, as amended, 62 Stat. 961, 28 U.S.A. 2072.

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution . . ."

ACT of JUNE 19, 1934, 48 Stat. 1064, 28 U.S.C. 723c.

"Sec. 2. The Court may at any time unite the general rules prescribed for it for cases in equity with those in ac-

tions at law so as to secure one form of civil action and procedure for both: provided, however, that in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

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28 U. S. C. Federal Rules of Civil Procedure—Rule 38(a).

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.